IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 19.09.2007

CORAM:

THE HONOURABLE MR.JUSTICE ELIPE DHARMARAO
AND
THE HONOURABLE MR.JUSTICE S.TAMILVANAN

Writ Appeals No.977 and 978 of 1999
AND
WAMP. No.133 of 2007

The Management of EID Parry (India) Ltd.
Pugalur 639 113. ..Appellant in
both the W.As.

Vs.

1. The Govt.of Tamil Nadu
rep.by the Secretary to Government
Labour & Employment Department
Fort St.George
Madras 9.

2. The Presiding Officer
Industrial Tribunal
Chennai 600 104.

3. The Management of Nava Bharat Ferro Alloys Ltd.
Madras 6.

4. The Secretary
Pugalar Sarkarai Alai Podhu Thozhilalar Sangam
Pugalur.

5. The Secretary
Pugalur Sarkarai Alai Thozhilalar Sangam (AITUC)
Pugalur.

6. The Secretary
Pugalur Sarkarai Alai Thozhilalar Sangam (LPF)
Pugalur.

7. The Secretary

Pugalur Sarkarai Alai Anna Thizhilalar Munnetra Sangam (ATP)
Pugalur.

8. The Secretary
DSA Company Staff and Workers Union
Pugalur.

9. The Secretary
Deccan Sugars National Workers Union
Pugalur (INTUC)

10.The Secretary,
DSA Company Workers Union (CITU)
Pugalur. ..Respondents in
both the W.As.

For appellants in both W.As. : Dr.Rajeev Dhawan, SC for M/s.T.S.Gopalan & Co.

For R.4 to R.6 in both the W.As. : Mr.A.L.Somayaji, SC for M/s.T.R.Rajaraman

For R.1 in both the W.As : Mr.R.Viduthalai, Advocate General
assisted by Mr.G.Sankaran, Spl. G.P.

For R.9 in both the W.As. : Mr.Dhamodharan

For others : No Appearance

COMMON JUDGMENT

ELIPE DHARMARAO, J.

By an agreement dated 30.10.1992, the Deccan Sugars Undertaking at Pugalur was transferred from Nava Bharat Ferro Alloys Limited (third respondent herein) to EID Parry (India) Limited (the appellant herein), which caused non-employment of 651 workmen. As against such transfer, the workers undertook protests, which turned violent. Then, the matter was referred to the Industrial Tribunal by the Government by their G.O.(D) Nos.318, dated 30.4.1993, considering the fact that there exists an industrial dispute to be adjudicated by the Industrial Tribunal. Aggrieved, the appellant herein has filed W.P.No.11407 of 1993 while the Management of third respondent has filed W.P.No.12539 of 1993, both praying to issue a Writ of Certiorari calling for the records of the Government in G.O.(D) No.318, dated 30.4.1993 and quash the same. The appellant Management has also filed W.P.No.11408 of 1993, praying to issue a Writ of Prohibition, prohibiting the Industrial Tribunal from proceeding to adjudicate the dispute referred to it by the Government in G.O.(D) No.318, dated 30.4.1993. The reference was challenged by the appellant and the third respondent Managements on the grounds that since the workmen were paid compensation, they cannot challenge the agreement and no such industrial dispute arose and that even regarding the said reference, a judicial review would lie.

2. The learned single Judge, considering all the facts and circumstances of the cases and holding that there exists an industrial dispute, which should be adjudicated by the industrial tribunal, as has been referred by the Government, has dismissed the writ petitions filed by both the Managements. Both the Managements have preferred Writ Appeals, wherein the Division Bench, held that there is no dispute that the referring power of the Government, though an administrative one in nature, is amenable to judicial review. The Division Bench, after perusing the files produced by the learned Additional Advocate General, had found that the Government had sufficient materials before taking a decision under Section 10(1) of the Industrial Disputes Act Act and the only requirement of Section 10(1) of the Industrial Disputes Act is formation of an opinion based on factual existence of industrial dispute or apprehended dispute which is abundantly available though the adequacy of which cannot be gone into under Article 226 of the constitution of India and that the Government had applied their mind and arrived at a conclusion that an Industrial dispute exists and after perusal of the G.O. file it is clear that no extraneous considerations were taken note of as claimed by the Management. With such observations, the Division Bench has dismissed all the writ appeals by its common judgment dated 6.1.2006.

3. Aggrieved against the said common judgment of the Division Bench of this Court rendered in W.A.Nos.977 and 978 of 1999, the appellant herein has preferred SLP (Civil) No.3840 of 2006 before the Honourable Supreme Court and Their Lordships of the Honourable Supreme Court, by the order dated 1.9.2006, have disposed of the said SLP. The Order of the Honourable Supreme Court dated 1.9.2006, as amended by the order dated 13.9.2006, reads as follows:

"Having heard Dr.Rajiv Dhawan, learned senior counsel appearing on behalf of the petitioner and Mr.R.Venkataramani, learned senior counsel appearing on behalf of the State of Tamil Nadu, we are of the opinion that interest of justice would be subserved if the Division Bench of the High Court is requested to give an opportunity to the parties as the records were produced by the State after the judgment was reserved. The petitioner to file its response in relation to the records of these proceedings on the basis whereof a reference has been made by a notification dated 30.4.1993 in terms of Section 10(1)(d) of the Industrial Disputes Act, 1947. Keeping in view the fact that the parties have filed their respective written submissions before the High Court, we are of the opinion that the petitioner may be allowed to inspect the records produced by the State whereupon it may file its comments with regard thereto supported by an affidavit. The Division Bench may hear the parties confined only to the records filed by the State and the affidavits filed by the parties in relation thereto, if any. We hope and trust, keeping in view the fact that only limited hearing is required to be given by the Bench, which has passed the order, the matter would be taken up and disposed of within four weeks.

The special leave petition is disposed of accordingly."

4. Thus, the remand made by the Honourable Supreme Court at the instance of the appellant herein is confined only to the records filed by the State and the affidavits filed by the parties in relation thereto and nothing more.

5. However, Dr.Rajiv Dhawan, the learned senior counsel appearing for the appellant has argued many things like res judicata, the aspect of judicial review into the matters of reference etc. and also relied on the following judgments:

1. ONGC MADRAS PORT CONTRACT EMPLOYEES UNION vs. THE MANAGEMENT OF OIL AND NATURAL GAS CORPORATION LTD. [2005 (2) CTC 1],

2. NEWSPAPERS LTD. vs. INDUSTRIAL TRIBUNAL, UTTAR PRADESH AND OTHERS [1957(2) LLJ

1],

3. HOCHTIEF GAMMON vs. STATE OF ORISSA AND OTHERS [(1975) 2 SC 649],

4. M/s.SHAW WALLACE AND COMPANY LTD. vs. STATE OF TAMIL NADU [1988 (1) LLJ 177],

5. NATIONAL ENGINEERING INDUSTRIES LTD. vs. STATE OF RAJASTHAN AND OTHERS [(2000) 1 SCC 371],

6. WORKERS OF SAGAR TALKIES (SOUTH INDIA CINEMA EMPLOYEES' ASSOCIATION) vs. ODEON CINEMA, MADRAS AND OTHERS [1957 (1) LLJ 639],

7. MAHARASHTRA STATE ELECTRICITY BOARD vs. INDUSTRIAL TRIBUNAL, BOMBAY AND OTHERS [1965(2) LLJ 458],

8. WORKMEN OF BRAHMPUTRA TEA ESTATE vs. THE INCOMING MANAGEMENT OF BRAHMPUTRA TEA ESTATE AND OTHERS [1969 (2) LLJ 685] and

9. TERI OAT ESTATES (P) LTD. vs. U.T. CHANDIGARH AND OTHERS [(2004) 2 SCC 130].

6. In ONGC MADRAS PORT CONTRACT EMPLOYEES UNION vs. THE MANAGEMENT OF OIL AND NATURAL GAS CORPORATION LTD. [2005 (2) CTC 1], the Division Bench of this Court has held:

"... the law is now well settled that even an administrative order is subject to judicial review, though on much more limited grounds than a quasi-judicial order. In other words, the grounds for challenging an administrative order are much narrower than the grounds available for challenging a quasi-judicial order. However, it cannot be said that an administrative order can never be challenged at all."

It has also been held that:

"... it was therefore incumbent upon the Central Government to have atleast recorded a prima facie finding whether the workmen concerned were employees of the writ petitioner or only employees of the contractor, and whether the claim of the workmen concerned had already been settled. The writ petitioner had raised specific objections to this effect before the Assistant Labour Commissioner in conciliation proceedings. In our opinion these objections were certainly relevant in deciding whether to make a reference or not, but it appears that they were not taken into consideration. In our opinion, the Central Government has not complied with the dicta of the Supreme Court in National Engineering Industries V. State of Rajasthan [2000 (1) SCC 371] and Bangaigaon Refinery & Petrochemicals Ltd. V. Samijuddin Ahmed [2001 (9) SCC 557] and hence the reference order is vitiated."

7. In NEWSPAPERS LTD. vs. INDUSTRIAL TRIBUNAL, UTTAR PRADESH AND OTHERS [1957(2) LLJ 1], a three Judge Bench of the Honourable Supreme Court has held:

"In spite of the fact that the making of a reference by the Government under the Industrial Disputes Act is the exercise of its administrative powers, that is not destructive of the rights of an aggrieved party to show that what was referred was not an 'industrial dispute' at all and therefore the jurisdiction of the Industrial Tribunal to make the award can be questioned, even though the factual existence of a dispute may not be subject to a party's challenge."

8. In HOCHTIEF GAMMON vs. STATE OF ORISSA AND OTHERS [(1975) 2 SC 649], a three Judge Bench of the Honourable Apex Court has held:

"The breach of Section 25F is no doubt a serious matter and normally the appropriate Government would refer a dispute of this kind for industrial adjudication; but the provision contained in Section 10(1) read with Section 12(5) clearly shows that even where a breach of Section 25F is alleged, the appropriate Government may have to consider the expediency of making a reference and if after considering all the relevant facts the appropriate Government comes to the conclusion that it would be inexpedient to make the reference, it would be competent to it to refuse to make such a reference. If the appropriate Government refuses to make a reference for irrelevant considerations, or on extraneous grounds, or acts mala fide, that, of course, would be another matter; in such a case a party would be entitled to move the High Court for a writ of mandamus."

".... The courts have power to see that the Execution acts lawfully. It is no answer to the exercise of that power to say that the Executive acted bona fide nor that they have bestowed painstaking consideration. They cannot avoid scrutiny by courts by failing to give reasons. If they give reasons and they are not good reasons, the court can direct them to reconsider the matter in the light of relevant matters, though the propriety, adequacy or satisfactory character of those reasons may not be open to judicial review. Even of the Execution considers it inexpedient to exercise their powers they should state their reasons and there must be material to show that they have considered all the relevant facts."

9. In M/s.SHAW WALLACE AND COMPANY LTD. vs. STATE OF TAMIL NADU [1988 (1) LLJ 177], their Lordships of the Honourable Supreme Court have formulated the following principles regarding reference:

"(1) The Government would normally refer the dispute for adjudication;

(2) The Government may refuse to make reference, if -

(a) the claim is very stale;

(b) the claim is opposed to the provisions of the Act;

(c) the claim is inconsistent with any agreement between the parties;

(d) the claim is patently frivolous;

(e) the impact of the claim on the general relations between the employer and the employees in the region is likely to be adverse;

(f) the person concerned is not a workman as defined by the Act;

(3) The Government should not act on irrelevant and extraneous considerations;

(4) the Government should act honestly and bona fide;

(5) The Government should not embark on adjudication of the dispute; and

(6) The Government should not refuse reference on the ground that domestic enquiry was fairly and properly held and punishment awarded was appropriate."

10. In NATIONAL ENGINEERING INDUSTRIES LTD. vs. STATE OF RAJASTHAN AND OTHERS [(2000) 1 SCC 371], a Three Judge Bench of the Honourable Apex Court has held:

"Existence or apprehension of an industrial dispute is a condition precedent for making a reference. High Court can entertain a writ petition impugning a reference on the ground of non-existence of an actual or apprehended industrial dispute. But, Industrial Tribunal cannot examine the validity of a reference...."

11. In WORKERS OF SAGAR TALKIES (SOUTH INDIA CINEMA EMPLOYEES' ASSOCIATION) vs. ODEON CINEMA, MADRAS AND OTHERS [1957 (1) LLJ 639], a Division Bench of this Court, has held:

".... when as in this case the persons concerned were never employed by the employer, such persons cannot be deemed to be workmen. At the most, one can spell out a contract to employ the old workers of Sagar Talkies; but a mere contract, by itself, could not bring about the relationship of employer and employee, or employer and workman."

12. In MAHARASHTRA STATE ELECTRICITY BOARD vs. INDUSTRIAL TRIBUNAL, BOMBAY AND OTHERS [1965(2) LLJ 458], their Lordships of the Honourable Apex Court have held that:

"... the mere similarity of business is not the decisive test. It is not enough that the business should be of the same nature, but it must be the same business which is carried on by the transferor.... On an evaluation of all the factors, we are of the view that the conclusion to which the tribunal reached, namely, that the Board was a successor-in-interest of the company, cannot be sustained."

13. In WORKMEN OF BRAHMPUTRA TEA ESTATE vs. THE INCOMING MANAGEMENT OF BRAHMPUTRA TEA ESTATE AND OTHERS [1969 (2) LLJ 685], a three Judge Bench of the Honourable Supreme Court, agreeing with the contentions of the learned Solicitor General appearing on behalf of the first respondent therein that it was not the successor-in-interest of the Tea Company nor did he claim through the Receiver, who was one of the parties to the Reference, before the Labour Court, has held that the view of the Labour court, that the first respondent is not liable to answer any of the claims of the workmen concerned, is perfectly justified."

14. In TERI OAT ESTATES (P) LTD. vs. U.T. CHANDIGARH AND OTHERS [(2004) 2 SCC 130], their Lordships of the Honourable Supreme Court have held:

"Exercise of statutory power or discretion by administrative authority affecting fundamental right, should be in consonance with doctrine of proportionality."

15. Citing the above judgments, Dr.Rajeev Dhawan, the learned senior counsel appearing for the appellant would submit that since no dispute, much less an industrial dispute lies between the appellant, third respondent and the workmen, the reference made by the first respondent Government even against the appellant, without proper appreciation of the facts and circumstances of the case and without application of mind and without recording any finding whether the workmen concerned were employees of the appellant or only the employees of the third respondent company and further in the absence of any conciliation proceedings, is bad in law.

16. On the contrary, repudiating the arguments advanced on the part of the learned senior counsel for the appellant, the learned Advocate-General would submit that the Government has taken into consideration all the facts and circumstances of the case and applying its mind has referred the matter for adjudication since in the considered opinion of the Government, there exists an industrial

dispute to be adjudicated by the Industrial Tribunal. The learned Advocate General would further submit that all the judgments cited by the learned senior counsel for the appellant are rendered after an Award has been passed by the Labour Court and therefore, the appellant should have waited for the passing of the Award instead of filing the present writ petition against the reference itself. The learned Advocate General would further submit that whatever the contentions raised or objections taken regarding the reference that he is not answerable or that he is not a necessary party to the dispute has to be raised before the Tribunal, but not by questioning the main reference itself. In support of his contentions, the learned Advocate-General has relied on the following judgments:

1. STATE OF MADRAS vs. C.P.SARATHY [AIR 1953 SC 53],

2. RAM AVTAR SHARMA vs. STATE OF HARYANA [AIR 1985 SC 915],

3. GURMAIL SINGH AND OTHERS ETC. vs. STATE OF PUNJAB AND OTHERS [1991 (2) LLJ 76 (SC)],

4. N.T.C. (SOUTH MAHARASHTRA) LTD. vs. RASHTRIYA MILL MAZDOOR SANGH [(1993) 1 SCC 217] and

5. SULTAN SINGH vs. STATE OF HARYANA [(1996) 2 SCC 66].

17. In STATE OF MADRAS vs. C.P.SARATHY [AIR 1953 SC 53], the Constitutional Bench of the Honourable Supreme Court has held:

"This is, however, not to say that the Government will be justified in making a reference under S.10(1) without satisfying itself on the facts and circumstances brought to its notice that an industrial dispute exists or is apprehended in relation to an establishment or a definite group of establishments engaged in a particular industry. It is also desirable that the Government should, wherever possible, indicate the nature of the dispute in the order of reference. But, it must be remembered that in making a reference under S.10(1), the Government is doing an Administrative Act and the fact that it has to form an opinion as to the factual existence of an industrial dispute as a preliminary step to the discharge of its function does not make it any the less administrative in character. The Court cannot, therefore, canvass the order of reference closely to see if there was any material before the Government to support its conclusion, as it was a judicial or quasi-judicial determination. No doubt, it will be open to a party seeking to impugn the resulting award to show that what was referred by the Government was not an industrial dispute within the meaning of the Act, and that, therefore, the Tribunal had no jurisdiction to make the award. But, if the dispute was an industrial dispute as defined in the Act, its factual existence and the expediency of making a reference in the circumstances of a particular case are matters entirely for the Government to decide upon and it will not be competent for the Court to hold the reference bad and quash the proceedings for want of jurisdiction merely because there was, in its opinion, no material before the Government on which it could have come to an affirmative conclusion on those matters..."

18. In RAM AVTAR SHARMA vs. STATE OF HARYANA [AIR 1985 SC 915], their Lordships of the Honourable Apex Court have held as follows:

"While exercising power under S.10(1), the function performed by the appropriate Government is an administrative function and not a judicial or quasi-judicial function."

"If the Government performs an administrative act while either making or refusing to make a

reference under S.10(1), it cannot delve into the merits of the dispute and take upon itself the determination of lis. That would certainly be in excess of the power conferred by S.10. S.10 requires the appropriate Government to be satisfied that an industrial dispute exists or is apprehended. This may permit the appropriate Government to determine prima facie whether an industrial dispute exists or the claim is frivolous or bogus or put forth for extraneous and irrelevant reasons not for justice or industrial peace and harmony. Every administrative determination must be based on grounds relevant and germane to the exercise of power. If the administrative determination is based on grounds irrelevant, extraneous or not germane to the exercise of power it is liable to be questioned in exercise of the power of judicial review. Therefore, the court may not issue writ of mandamus, directing the Government to make a reference but the court can after examining the reasons given by the appropriate Government for refusing to make a reference come to a conclusion that they are irrelevant, extraneous or not germane to the determination and then can direct the Government to reconsider the matter."

19. In GURMAIL SINGH AND OTHERS ETC. vs. STATE OF PUNJAB AND OTHERS [1991 (2) LLJ 76 (SC)], the Three Judge Bench of the Honourable Apex Court has held that fictitious transfer of ownership of an undertaking will not fall under Section 25FF of the Industrial Disputes Act.

20. In N.T.C. (SOUTH MAHARASHTRA) LTD. vs. RASHTRIYA MILL MAZDOOR SANGH [(1993) 1 SCC 217], the Three Judge Bench of the Honourable Apex Court has held:

"However, such transfer may not in all cases amount to the termination of employment. The proviso to Section 25-FF deals with the matter as to in what circumstances the transfer by itself would not be considered as termination of employment and the workmen need not be paid the retrenchment compensation. The reading of Section 25-FF as a whole, therefore, shows that unless the transfer falls under the proviso, the employees of the undertaking concerned are entitled to claim compensation against the transferor and they cannot make any claim for re-employment against the transferee of the undertaking. But when the transfer falls under the said proviso, the transfer does not result in the termination of the contract of employment."

21. In SULTAN SINGH vs. STATE OF HARYANA [(1996) 2 SCC 66], their Lordships of the Honourable Apex Court have held that sub-section (5) of Section 12 of the Act does not enjoin the appropriate Government to record reasons for making reference under S.10(1) and it enjoins to record reasons only when it refuses to make a reference.

22. Citing the above judgments, the learned Advocate General would submit that the transfer of undertaking itself is mala fide and therefore, as has been held by the Honourable Apex Court in Gurmail Singh's case (supra), such a fictitious transfer of ownership of an undertaking will not fall under Section 25FF of the Act and therefore, the Government is correct in referring the matter for adjudication.

23. Mr.A.L.Somayaji, the learned senior counsel appearing for the workers would submit that labour agitation is an industrial dispute and therefore, the Labour Court has to adjudicate upon the matter. The learned senior counsel has also submitted that the entire case has to be confined only to the remand made by the Honourable Supreme Court i.e. only with reference to the records. Replying to the argument of the learned senior counsel appearing for the appellant that in the absence of any conciliation proceedings, the reference is bad, Mr.Somayaji, would submit that the letters written by the Labour Commissioners, narrating the entire facts and circumstances of the case, can be construed as conciliation failure reports. He would further submit that the Government is not restrained to refer the matter when it has satisfied that there exists an industrial dispute to be adjudicated upon by the Labour Court.

24. Regarding the question of res judicata as pointed out by the learned senior counsel for the appellant, based on the decision of the learned single Judge of this Court in WORKMEN OF DECCAN SUGARS vs. NAVA BHARAT FERRO ALLOYS LTD. [1993 (2) LLN 173), it is to be mentioned that the learned single Judge, considering the issue regarding the validity of the transfer and whether in a case of transfer of undertaking, the employer is bound to comply with the requirements of S.25-N and 25-O of the Act, and finding that the claim of the workmen that transfer of undertaking would amount to closure of undertaking has no merit, dismissed the writ petition in limine. This judgment was rendered by the learned single Judge, without notice to the management and at the instance of the learned counsel for the petitioners therein and therefore, as has already been held by the Division Bench of this Court, it cannot be held to be operating as a res judicata.

25. At this juncture, it is also to be mentioned that though a common judgment has been passed by the Division Bench of this Court on 6.1.2006 in Writ Appeals No.977 to 979 of 1999, only the appellant in Writ Appeals No.977 and 978 of 1999 viz. EID Parry (India) Limited has preferred SLP before the Honourable Supreme Court, wherein the Honourable Supreme Court has passed the order, extracted supra. Thus, it is clear that the judgment passed by this Court in Writ Appeal No.979 of 1999, preferred by the third respondent herein Nava Bharat Ferro Alloys Limited has become final since not set aside by the upper forum of law. Now, let us consider the case of he appellant, after going through the records of the Government.

26. Pursuant to the directions of the Honourable Supreme Court, the appellant has filed an additional affidavit dated 2.4.2007 stating inter alia that a perusal of the documents exposed to the Court would clearly reveal that there has been no application of mind whatsoever whether a reference can be made against the appellant or not and as a matter of fact, there is no reason to include the appellant in the reference and as a matter of law, the appellant could not have been summoned for these proceedings and drawn into the reference as it neither a proper party nor necessary party. It is further submitted that even if reasons are not given, the first respondent is under duty to show that reasons exist and in this case, apart from the exposed file, no reasons have been given and thus a very serious issue of judicial review arises, in that the Government has misdirected itself both in law and on facts. It is further stated that the appellant Management, which has no liability towards the workmen, has no objection to the reference continuing against the third respondent, against whom relief is claimed and in fact, this would hasten the process and bring it to a fruition. It has been further submitted that this aspect of the matter relating to the non-existence of any reason in law for including the appellant into reference exists be considered by this Court and the order of reference quashed against it.

27. The first respondent Government has filed an additional counter affidavit stating that the non-employment of 651 employees arose during the transfer of undertaking from the 3rd respondent to the appellant, which both the transferor and the transferee company are liable to answer and one cannot shift the burden on the other or vice-versa because ultimately, it is the workers who are affected and whose plight is not known for more than 14 years and hence the appellant company cannot escape its liability and therefore, the Government had all valid reasons to make the reference against the appellant, which is substantiated by the Government in its order of reference. It is further submitted that the appellant being a transferee company, is a proper and necessary party to the dispute; that the Division Bench has observed that the order of reference is self-explanatory and hence filing of an affidavit is not necessary. It is not that the Government was silent as to why the reference was made against the appellant. Being a transferee company, the appellant is bound by the reference and the Division Bench after verifying the records had come to the conclusion that no better affidavit can be filed than what is stated in the reference and hence the appellant has no authority under law to raise this plea. It is for the Court of law to decide whether the appellant is a necessary party to the reference and the appellant itself cannot come to a conclusion that they are

not bound by the reference. It has also been submitted that the plight of 651 employees, who are thrown out of work and who are jobless not for few days or few months but for 14 years has to be considered on humanitarian ground and the non-employment of these workmen in no way has affected the functioning of the appellant management or the third respondent and the order of reference passed by the Government is in accordance with law within the purview of the Industrial Disputes Act, 1947. On the other hand, the appellant Management has dragged the matter, for the reasons best known to them, for the past 14 years in spite of having failed before the Honourable Single Judge and the Division Bench.

28. The main core of the argument on the part of the appellant is that they are not at all a necessary party to the reference and the Government has not applied its mind before referring the matter to the Industrial Tribunal for adjudication. It is also argued that since compensation has already been paid to the workers, referring the dispute to the Labour Court including the appellant as a party to the reference is bad in law.

29. It is the specific case of the workers that the entire transfer of undertaking between the appellant and the third respondent is fictitious. At this juncture, it is appropriate to look into the agreement, dated 30.10.1992, entered into between the appellant and the third respondent. Clause (7) of the said agreement reads as follows:

"It is expressly agreed that the Transferee will not be liable to employ or retain the service of any workman/employee of the transferor as from the date of the Transfer of undertaking. It is further agreed that the Transferor will notify its workmen/employees about the transfer of the undertaking and the date from which it so takes effect and settle all statutory claims of the workmen/employees upto the date of the transfer of undertaking prior to the transfer of undertaking. No claim of any employee of the transferor in respect of his employment with the transferor shall devolve on the transferee. It is also confirmed between the parties that the transferee is under no obligation of any form to the workmen/employees of the transferor. It is the sole liability of the Transferor to meet whatever claims his workmen/employees may have with reference to their employment as on the transfer date."

Clause (9) of the said agreement reads as follows:

"The transferor shall be liable and responsible for all obligations or liabilities arising from or in respect of the business of the undertaking upto and including the Transfer Date and shall indemnify transferee against all claims, expenses or other liabilities as a consequence of the failure, refusal or neglect on the part of the transferor to comply with its obligations under this clause."

30. Thus, on a perusal of the said clauses of the agreement, no man of ordinary prudence could dispute that both the appellant and the third respondent have given a simple go-bye to the benefit and welfare of the employees who were till time working with the third respondent, which must have been the prime concern of both the Managements while entering into the transfer of Undertaking. We wonder as to how such sweeping, draconian, unilateral and lopsided clauses could be inserted into the agreement behind the back of the hundreds of poor workmen, that too detriment to their rights and depriving them of their sole livelihood. The pathetic result of this exfacie fictitious transfer is loss of lives of 140 workers apparently by and as a result of starvation. Therefore, as has been held by the Honourable Apex Court in Gurmail Singh's case, such a fictitious transfer of ownership of an undertaking will not fall under the purview of Section 25-FF of the Act. A clever drafting of the agreement, apparently throwing to winds the welfare of the workmen, does not in any manner relieve the appellant from its obligations to face the reference before the Labour Court. After the transfer of the Undertaking, we do not know how the transferor company will consider the

employment of workmen and it is for the transferee to consider the employment of the workmen, as he is holding the Unit. Therefore, since being a party to the fictitious transfer, ignoring the welfare of the workmen, leading to loss of livelihood of hundreds of workmen, which led to the loss of 140 lives, the appellant cannot now contend that it is not a necessary party to the reference and hence the reference has to be quashed insofar as it is concerned. The workers were never consulted before such transfer of the Undertaking. Since their rights and livelihood are at stake, the workers can very well question the validity of the agreement entered into between both the Managements. Therefore, as has already been held by the Division Bench, both the Managements are free to put forth all their defence legally sustainable before the Industrial Tribunal and it will not, in any way, affect the validity of the order of reference made by the Government. The Labour Court can also go into the prejudice caused to the workmen by virtue of such a transfer of the Undertaking.

31. There is no dispute regarding the proposition laid down by the Honourable Apex Court in Sultan Singh's case [1996 (2) SCC 66] that sub-section (5) of Section 12 of the Industrial Disputes Act does not enjoin the appropriate Government to record reasons for making reference under Section 10(1). This aspect has very well been discussed and decided by the Division Bench in the judgment dated 6.1.2006.

32. Coming to the question of application of mind, as directed by the Division Bench, the learned Additional Advocate General has produced the records relating to the impugned G.O.(D) No.318 Labour and Employment Department dated 30.4.1993 before the Court. As has been observed by the Division Bench in its judgment dated 6.1.2006, the file contains all relevant materials such as Call Attention Motion in the Assembly with regard to the agitation by the workers of Deccan Sugars Factory at Pugalur; the report of the Labour Commissioner dated 13.4.1993 addressed to the Secretary to the Government, Labour and Employment Department, Chennai-9 regarding the termination of the workers; the report of the Commissioner of Labour dated 17.3.2003 etc. which speak about the agitation by the workers through their Union, demonstration in front of the main office, indulging in stone-pelting, using acid bombs, gaseline bombs, country bombs, damage to the Transport Corporation buses due to pelting of stones etc., which led to lathi-charge and firing warning shots by the Police and though the impugned reference did not mention all the events specifically, necessary and relevant materials are available for the Government to make an order of reference, which was correctly done by the first respondent. In this backdrop of the observations by the Division Bench, pursuant to the directions of the Honourable Supreme Court, the appellant, having gone through the files relating to the impugned G.O., has raised the following points, as could be seen from their additional affidavit dated 2.4.2007:

"(a) G.O.(D)318, dated 30.4.93 does not make any reference to a conciliation report or to the letter dated 10.4.93 written by the Assistant Commissioner of Labour and refers only to a letter dated 12.4.1993 of the Commissioner of Labour.

(b) No reference is made to the consistent stand of the appellant that it cannot be made a party to the reference and no relief can be granted against it. This issue is not even examined by the 1st respondent.

(c) The exposed file records the proceedings in the Assembly, the letter of Commissioner of Labour and the letter of Assistant Commissioner of Labour. These documents point to a law and order/public order situation which by itself cannot be the basis of a reference while conciliation was still going on.

(d) Specific attention is drawn to the following finding in the letter of the Assistant Commissioner of Labour "in the incident, none of the workmen or officials employed by the present management i.e.

EID Parry (India) Limited are involved.

(e) There is also no reference to the judgment of this Honourable Court in WP 19772/92. It would specifically go to show that what was done was sonly transfer of undertaking and not a closure."

33. Thus, all these points raised by the appellant, after perusal of the files produced by the first respondent, would raise the one and the only point of the appellant that the impugned G.O. does not contain all the details. This aspect has already been examined by the Division Bench in Para No.20 of its judgment and has observed that:

"Though the impugned reference did not mention all the events specifically, as rightly pointed out by the learned Additional Advocate General, necessary and relevant materials are available which are sufficient for the Government to make an order of reference. It is true that the Division Bench in 2005 (II) CTC 1 (supra), has observed in para 47 that it was incumbent upon the Government to have recorded a prima facie finding whether the workmen concerned were employees of the writ petitioner or only employees of the contractor, and whether the claim of the workmen concerned had already been settled. In other words, according to the learned senior counsel for the appellants, the order of reference must contain prima facie finding by the Government relating to existence of an industrial dispute. We have already extracted Section 10(1) of the Act which enables the appropriate Government that if any "industrial dispute exists" or apprehended and on satisfaction, to refer any matter in connection with the industrial dispute to a Court at any time. It will be useful to refer that in Sultan Singh's case (1996(2) SCC 66), the Honourable Supreme Court has held that sub-section (5) of Section 12 of the Act does not enjoin the appropriate Government to record reasons for making reference under Section 10(1). It enjoins to record reasons only when it refuses to make a reference...."

34. On a careful perusal of the materials placed on record and the judgment of the Division Bench of this Court dated 6.1.2006, in the light of the order of the Honourable Supreme Court and the subsequent affidavits filed by the appellant and the first respondent, when such a serious dispute is brought to its notice, a duty is cast on the Government to refer the matter for adjudication to the Industrial Tribunal based on the material, which was properly done by the first respondent Government. As has already been observed supra, Section 10(1) of the Industrial Disputes Act contemplates even on 'apprehension' the dispute can be referred to the Industrial Tribunal for adjudication and as has already been adverted to supra, since the transfer of Undertaking itself is fictitious, depriving the livelihood of hundreds of workmen, the appellant cannot be said to be an unnecessary party to the reference. The absence of concilition proceedings, argued by the learned senior counsel for the appellant has already been dealt with by the Division Bench and has been well answered by Mr.Somayaji that in the peculiar facts and circumstances of the case, the communications of the Labour Commissioners could themselves be treated as failure reports to refer the matter for adjudication by the Government. At the cost of repetition, it has to be mentioned that we cannot traverse beyond the scope of the remand which is confined only to the records filed by the State and the affidavits filed by the parties in relation thereto.

35. On consideration of the records filed by the State and the affidavits filed by the parties in relation thereto, we have no hesitation to hold that there is complete application of mind on the part of the first respondent while referring the dispute between the transferor company, transferee company and the employees for adjudication to the Industrial Tribunal and the fact that the appellant company is a necessary party to the adjudication cannot at all be disputed since being a transferee company.

36. As has already been observed by the Division Bench, there is no dispute that the workmen have

received the compensation only under protest, thus protecting and preserving their rights to agitate, but the appellant, for no better reason, is stalling the entire reference proceedings by resorting to various kinds of litigations, in spite of meritorious orders passed by the learned single Judge and the Division Bench, causing further agony to 651 employees, who were stripped-off their livelihood and thrown to streets over-night, resulting in the death of 140 of them also, under the garb of an agreement of transfer of Undertaking. When this aspect has been brought to the notice of the Division Bench, the appellant has commented the same that the entire aspect has been dramatized. Such an attitude of the appellant, commenting the traumatic condition of the poor workers as dramatic, besides being not appreciable is rather condemnable. The appellant unnecessarily dragging on the dispute and stalling the entire reference proceedings even after 14 years of reference, without allowing it see the light of the day, putting at stake the rights of the labour and their livelihood, we consider it appropriate to direct the appellant to deposit a sum of Rs.10,000/= per each employee, whose names have been mentioned in the impugned G.O., by way of costs before the Industrial Tribunal to which the reference is made, within four weeks from the date of receipt of a copy of this order.

37. To sum-up, it is to be held that there is no res judicata operating in this matter and that the Government has applied its mind in the manner required by law and has considered all the facts and circumstances of the case while referring the dispute to the Labour Court for adjudication and that the appellant is a proper and necessary party to the reference made by the Government to the Labour Court.

38. For all these reasons, we are not able to find any merit in the contentions of the appellant and accordingly, both these appeals are dismissed. Consequently, WAMP.No.133 of 2007 is closed.

Since the reference itself is 14 years old, we direct the Industrial Tribunal to dispose of the Industrial Dispute within six months on merits and in accordance with law. The parties are directed to cooperate with the Labour Court for early disposal of the case.

Rao

To

1. The Industrial Tribunal,
Chennai 104.

2. The Secretary to the Government of Tamil Nadu,
Labour & Employment Department,
Fort St.George,
Madras 9.